

124 FERC ¶ 61,093  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

July 28, 2008

In Reply Refer To:  
Consumers Power Company,  
Docket Nos. PR97-1-004 and  
PR97-1-005

Consumers Energy Company  
Mrs. Deborah Moss, Esq.  
1730 Rhode Island Ave., N.W.  
Washington, D.C. 20036

Dear Mrs. Moss:

1. On February 1, 2008, Consumers Energy Company (Consumers),<sup>1</sup> on behalf of itself and Duke Energy Trading and Marketing, L.L.C., Dynergy Marketing and Trade, and Reliant Energy Services, Inc. (collectively “Settling Parties”), filed an offer of settlement in the above-referenced docket (Settlement Agreement). On March 18, 2008, the Presiding Administrative Law Judge certified the Settlement Agreement to the Commission as uncontested.<sup>2</sup> The Settlement Agreement resolves all the issues set for hearing in the Commission’s September 19, 2007 Order Granting Intervention, Denying Motion for Summary Disposition and Establishing Hearing Procedures.<sup>3</sup>

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<sup>1</sup> Consumers is a Hinshaw pipeline with facilities located in Michigan. It performs interstate transportation services pursuant to a blanket certificate issued in accordance to section 284.224 of the Commission’s regulations. *Consumers Power Co.*, 122 FERC ¶ 63,010, at P 2 (2008).

<sup>2</sup> *Consumers Power Co.*, 122 FERC ¶ 63,010 (2008).

<sup>3</sup> *Consumers Power Co.*, 120 FERC ¶ 61,252 (2007).

2. The following is a summary of the major provisions of the Settlement Agreement:

- a. Article III provides that Consumers will charge a maximum title transfer tracking (TTT) service rate of \$4.00 per transaction (Settlement Rate). The Settlement Rate will become effective on the first day of the month following the date an order approving the Settlement Agreement in its entirety without condition or modification is issued by the Commission. Should the Commission's order, however, condition or modify the Settlement Agreement, the rate will become effective on the first day of the month after the Settling Parties agree to such conditions or modifications or the effective Date of the Settlement Agreement as defined in Article X (Effective Date), whichever comes first.
- b. Article IV governs the provision of settlement payments by Consumers to its customers who took TTT service between October 1, 1996 and November 27, 2007 (Customers) and provides that Consumers will pay an aggregate \$761,739 to those Customers that are also parties in the proceeding. The amounts of the individual payments are set forth in Attachment A. Article IV further provides that Consumers will pay an aggregate \$1,238,261 to Customers who are not parties in the proceeding. The amounts of the individual payments to these Customers are set forth in Attachment B of the Settlement Agreement.
- c. Article V establishes a moratorium on changes to Consumers' TTT rate and provides that for three (3) years from the Effective Date of the Settlement Rate, no party will seek to make any changes to Consumers' TTT rate. Article V further provides that no party, including Consumers, will seek to have the Commission, or any other decisional authority, make a finding regarding Commission jurisdiction over Consumers' TTT service that would take effect prior to the termination of the moratorium period.
- d. Article VI states that the Settlement Agreement does not address the issue of Commission jurisdiction over Consumers' TTT service and that nothing in the Settlement Agreement precludes any party from making an argument in any forum or proceeding regarding Commission jurisdiction over Consumers' TTT service. Article VI further provides that regardless of any future determination by a decisional authority regarding Commission jurisdiction over Consumers' TTT service, Consumers shall be forever barred from

seeking to recover any portion of the \$2 million aggregate settlement payments made by Consumers in accordance with Article IV of the Settlement Agreement.

- e. Article VII provides that Consumers makes no admission regarding Commission jurisdiction over its TTT service by entering into the Settlement Agreement.
- f. Article VIII provides that, on the Effective Date of the Settlement Agreement, Consumers' Request for Rehearing or, in the Alternative, Clarification of Consumers Energy Company, and all associated pleadings filed by Consumers will be deemed withdrawn, and that Consumers will also withdraw its Petition for Judicial Review filed in the United States Court of Appeals for the District of Columbia Circuit in Case No. 07-1466.
- g. Article IX of the Agreement provides that the discussions relating to the Settlement are confidential under Rule 602 of the Commission's Rules of Practice and Procedure.
- h. Article X of the Settlement Agreement defines the effective date and provides that if the Commission should impose modifications that are unacceptable to the Settling Parties, the Settlement Agreement shall be deemed withdrawn.
- i. Article XI of the Settlement Agreement provides, *inter alia*, that the standard of review for any modifications of the Settlement Agreement not agreed to by all the Settling Parties, including any modification resulting from Commission action *sua sponte*, shall be the "public interest" standard under the *Mobile-Sierra* doctrine. It further provides that the "just and reasonable" standard will apply to all changes that are agreed to by all of the Settling Parties.

3. Commission Trial Staff filed initial comments in support of the Settlement Agreement on February 14, 2008. No other comments were filed. The Presiding Administrative Law Judge certified the Settlement Agreement to the Commission as uncontested on March 18, 2008 (Certification).

4. In light of *Maine Pub. Util. Comm'n v. FERC*, 520 F.3d 464, 477-78 (D.C. Cir. 2008), the Commission may not accept the standard of review provided in Article XI, section 11.6 as currently written. As such, the Settlement Agreement is approved conditioned on the settling parties revising the standard of review applicable to non-

settling third parties. An acceptable substitute provision applicable to non-settling third parties would be the “most stringent standard permissible under applicable law.” Consumers must, within thirty days of this order, file a revised standard of review provision consistent with this precedent.<sup>4</sup> Subject to this condition, the Settlement Agreement appears to be fair and reasonable and in the public interest and is hereby approved pursuant to Rule 602(g) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.602(g) (2008).

5. The Commission’s conditional approval of this Settlement Agreement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. This letter order does not relieve Consumers of its obligations to file the required reports under Part 284 of the Commission’s regulations.

6. This letter order terminates Docket Nos. PR97-1-004 and PR97-1-005.

By direction of the Commission. Commissioners Kelly and Wellinghoff dissenting in part with a separate joint statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

cc: All Parties

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<sup>4</sup> Cf. *Southern Star Central Gas Pipeline, Inc.*, 124 FERC ¶ 61,016, at P 14 (2008).

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Consumers Power Company

Docket Nos. PR97-1-004  
PR97-1-005

(Issued July 28, 2008)

KELLY and WELLINGHOFF, Commissioners, dissenting in part:

The instant settlement states that the “public interest” standard of review will apply to any modification to the settlement that is not agreed to by all of the settling parties, including any modification resulting from the Commission acting *sua sponte*.

The majority finds that, in light of the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,<sup>1</sup> the Commission may not accept the standard of review set forth in the instant settlement. Therefore, the majority approves the settlement conditioned on the settling parties revising the standard of review applicable to non-settling third parties. The majority also states that language applying the “most stringent standard permissible under applicable law” to non-settling third parties would be “[a]n acceptable substitute provision.”

We continue to disagree with the majority’s characterization of the D.C. Circuit’s holding in *Maine PUC* as to the applicability of the “public interest” standard. For the reasons set forth in our dissents in *Duke Energy Carolinas, LLC*<sup>2</sup> and *Westar Energy, Inc.*,<sup>3</sup> we respectfully dissent in part.

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Suede G. Kelly  
Commissioner

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Jon Wellinohff  
Commissioner

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<sup>1</sup> 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*).

<sup>2</sup> 123 FERC ¶ 61,201 (2008).

<sup>3</sup> 123 FERC ¶ 61,252 (2008).